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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 319

ESTATE OF RICHARD C. DUPONT, Deceased,
WILMINGTON TRUST COMPANY, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE S. LEISURE,
CARBERRY O'SHEA,
2 Wall Street,
New York 5, New York,

Attorneys for Petitioner.

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Estate of Richard C. DuPont, Deceased, Wilmington Trust Company, Executor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 16, 1956.

Opinions Below

The findings of fact and opinion of the Tax Court (App. 3a) are reported in 18 T. C. 1134. The opinion of the Court of Appeals (App. 27a) is reported in 233 F. 2d 210.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The judgment of the Court of Appeals was entered May 16, 1956.

Questions Presented

Was decedent in active service as a member of the military forces of the United States, within the meaning of Section 939 of the Internal Revenue Code of 1939, when, during World War II he was killed parachuting from a glider while on an ordered military mission, where his duties in the Air Forces were of a military nature which normally only commissioned officers are ordered to perform, he not being commissioned and for military reasons having all outward indicia of a civilian employee?

Statutes and Regulations Involved

Section 939(a) of the Internal Revenue Code of 1939 and pertinent Treasury Regulations thereunder are printed at pages 24a-26a of the Appendix of petitioner.

Statement of Case

Decedent was a famed expert in glider activities. In World War II the development and use of gliders for military invasion and combat was an urgent and vital part of the Air Forces program. General Arnold, the Commanding General of the Army Air Forces, appointed decedent, then only 31 years of age, as his Special Assistant and a member of the Air Staff with "the authority of an Assistant Chief

of Air Staff" to have charge of the Air Forces Glider Program. He was ordered to report directly to General Arnold. His duties were to plan and supervise the glider program; determine tactics, techniques and tactical proficiency requirements for use of gliders; determine policies, programs, standards and doctrines for training individuals and units; direct and coordinate testing of gliders; and in other ways to expedite the glider program.

Under orders from General Arnold decedent made various trips to military air stations and camps for glider surveys, maneuvers and tests. He worked in the field with Major General Ridgeway and airborne troops in devising training techniques and tactics for anticipated use of gliders in combat. In July, 1943, at the request of the Theater Commander he was ordered to the North African Theater of Operations during the campaign in Sicily. While there he personally observed the use of gliders in combat operations during the Sicilian Campaign. Subsequently he was posthumously awarded the Distinguished Service Medal for contributing materially to the successful accomplishment of a mission of the greatest importance in the war effort.

In appointing him as Special Assistant in charge of the Glider Program, General Arnold designated that he "serve in a civilian capacity". General Arnold would testify that by such words he meant that in civilian clothes du Pont could deal direct with the General and was thus relieved of channelling his activities through numerous subordinate military offices, and since time was crucially of the essence, his being in civilian clothes was "truly a military expedient". Thus, he was not commissioned as an

officer but to enable him to expedite the duties ordered by General Arnold he was given all the outward indicia of a civilian. He filed the Civil Service Commission form and took the oath of office of a government employee, the administrative assistant to the Secretary of War in a form designated his position as a Special Consultant, his appointment was for 90 days and extended, and his pay was $25 a day.

Decedent died on September 10, 1943, on "a military mission under direct orders from Headquarters" when, at March Field in California, his parachute opened too late after he had to bail out of a falling experimental glider, piloted by an Army Colonel, in which decedent was riding as an observer of its military characteristics.

General Arnold would testify that

> "Factually he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform in actual military combat."

The Tax Court held that Section 939 was an exemption statute to be strictly limited, and relying on the use of the word "soldier" in an extemporaneous statement made in a Congressional debate, held the statute embraced "only persons formally members of the armed forces." The Court of Appeals, looking only at the outward civilian indicia clothing decedent's position, affirmed.

Reasons for Granting the Writ

1. The decision of the Court below conflicts with the principle clearly established in *Commissioner* v. *Connelly*, 338 U. S. 258 (1949). That case held that the test of whether one is deemed in military service for purposes of the particular statute, is determined, not by his formal military or non-military status, but by whether his functions are of a military character. Section 939, here involved, without doubt was a tax relief or remedial measure entitled to liberal construction, enacted to remove the estate tax on those who died while performing hazardous military functions in line of their duties while actively serving as a member of the armed forces. The hazardous military dangers incident to military duties is key to the meaning of this statute. When Congress meant to limit the words "a member of the armed forces" to formally commissioned officers or enlisted men it used the words "commissioned officer" and "enlisted personnel" in Section 22(b)(13) of the Internal Revenue Code of 1939, whereas in order to carry out the alleviating purpose of Section 939 it used the broad words "citizen or resident".

In the *Connelly* case this Court held that the compensation received by a commissioned officer of the Coast Guard Reserve (by statute defined as part of the naval forces) was not "for active service as a commissioned officer in the military or naval forces" where the functions he performed as such an officer were the same civil service duties he performed as a lawyer in the Geodetic Survey before he was commissioned and in all other respects as to pay, leave, etc. he retained his former civilian status. The Court held,

in essence, that the statute was intended to exempt only pay received for performing military functions.

The instant case presents the reverse side of the coin. Here the functions decedent was called upon to perform were strictly of a military nature of the type which only an Air Force General can or is ordered to perform. Decedent was given the authority of an Assistant Chief of Air Staff, all of whom were generals. As the Court in the *Connelly* case laid aside the military status of taxpayer and looked at his civilian functions to carry out the Congressional purpose of Section 22(a)(13), so should the civilian indicia of decedent, assumed by him as a military expedient so he could under direct orders from General Arnold more quickly perform his military duties, be disregarded. His clear military functions bring him within Section 939.

In *Mitchell* v. *Cohen,* 333 U. S. 411 (1948), the question was whether the term "ex-servicemen" under the Veterans Preference Act included a person who served in the Coast Guard Reserve but whose functions were such as did not disrupt his regular civilian job or his home life. The Court adopted the military function test, and properly decided that his former military status should be disregarded where his military functions did not alter his regular civilian job.

In the instant case, the court below erroneously tested decedent's rights under Section 939 by his outward appearance of a civilian rather than, as Congress necessarily intended in such statute, by the hazardous military functions he was ordered to perform in line of his military duties and service in the Air Forces. Such disregard of the principles which this Court has so clearly established

renders the decision of the Court below in conflict with the *Connelly* and *Mitchell* cases and warrants this Court's review.

2. The Supreme Court has granted a petition for a writ of certiorari in *Jose Soriano* v. *United States,* No. 760. The fundamental question there presented is whether Filipino guerilla units engaged in military operations during the Japanese occupation of the Phillipines were in "the service of the armed forces of the United States" by reason of the call into such service of all the organized military forces of the Phillipine Government. The guerilla forces performed actual military operations and functions for our armed forces in the South Pacific after the surrender at Bataan and Corregidor of the formally inducted United States and Phillipine military forces.

Again this Court has before it the question of whether the formalistic or the realistic test should govern. Since the instant case presents a problem similar in principle and in application, it is appropriate that the writ sought be granted in this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE S. LEISURE,
CARBERRY O'SHEA,
Attorneys for Petitioner.

Of Counsel:
DONOVAN LEISURE NEWTON & IRVINE

No. 319

AUG 14 1956
JOHN T. FEY, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,800

ESTATE OF RICHARD C. DU PONT, DECEASED,
WILMINGTON TRUST COMPANY, EXECUTOR,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued April 19, 1956

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 16, 1956)

By GOODRICH, *Circuit Judge*

The present appeal is from a decision by the Tax Court of the United States deciding in favor of the Commissioner on two points raised by counsel for the taxpayer. 18 T.C. 1134 (1952). One of the questions is the valuation of certain life insurance policies owned by the decedent, Richard C. DuPont, on the life of his father. The other question involves an exemption from an additional estate tax imposed by section 935 of the Internal Revenue Code of 1939

(26 U.S.C.A. § 935) found in section 939 of the Internal Revenue Code. 26 U.S.C.A. § 939 (Supp. 1955). The last point will be considered first.

The exemption just mentioned reads as follows:

> "The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen . . . dying . . . while in active service as a member of the military or naval forces of the United States . . ."

The words to which we must give attention are the last ones in the quotation. Was Mr. Richard DuPont, at the time he met death in a glider accident, "a member of the military or naval forces of the United States?"

The decedent in his lifetime had acquired fame as an expert in glider activities. His experience and knowledge in this field resulted in his appointment as a member of the staff of General H. H. Arnold, Commanding General of the Army Air Forces. He was appointed a Special Assistant to the Commanding General "in charge of the Army's glider program for air transport of Army troops and cargo by gliders . . ." This quotation is taken from the findings of fact which in turn were largely composed of a stipulation between the parties which was adopted by the court. If living the General would have testified "Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat." The reference to the giving of his life was to the fact that Mr. DuPont had been killed in a glider accident while in the performance of his duties as special consultant.

There is no doubt that Mr. DuPont gave his life in the service of his country. Nevertheless, we think it clear that he did not come within the exception to section 935 already referred to. The reasons are to be found in the facts stipulated between the parties. Mr. DuPont filed a Civil Serv-

ice Commission form. He was appointed as "Special Consultant." His appointment was for a brief period, ninety days at the start. There was a special arrangement about his pay. It was to be $25.00 for each day he worked. His travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. It is quite clear to us that the Tax Court was correct in finding that the decedent was employed by the United States in a civilian capacity because that was a more convenient form of employment for him to have to accomplish the things which his expert knowledge would help him accomplish for the air force.

The undefinitive legislative history of this exemption paragraph is set out in the Tax Court's opinion and will not be repeated here.[1] Compare also for a comparable though not similar situation, *Commissioner v. Connelly*, 338 U.S. 258 (1949); likewise, for a case where the taxpayer had many more of the indicia of military service than we have in the present case, *United States v. Popham*, 198 F.2d 660 (8th Cir. 1952).

The second question is more difficult. The decedent owned, at the time of his death, some insurance policies upon the life of his father who was then living. He also owned an interest in a trust of other life insurance policies upon the life of his father. But the questions here involved will be settled if we consider only the first group.

It is conceded that the passing of these policies from the living to his successors is subject to tax "To the extent of the interest therein of the decedent at the time of his death . . ." under section 811(a) of the Internal Revenue Code of 1939, 26 U.S.C.A. § 811(a). The dispute here concerns a criterion to determine the extent of the decedent's interest at the time of his death, in other words, valuation. The Commissioner contends that the value is replacement

1 See 18 T.C. 1134, 1142 (1952). That the legislators were thinking in terms of "servicemen" finds additional support in a committee report which accompanied the bill extending the exemption to victims of the Korean conflict. S. Rep. No. 781, 82d Cong., 1st Sess. VIII, B, 1 (1951).

cost, that is, what it would cost to go out and get, on the effective date, this policy from the same or other insurance company. If such policies could not be purchased, then the value is to be set at interpolated terminal reserve. This is the reserve value which the company keeps on its books against its liability on the contracts plus the adjustment of the reserve to the specific date in question. *Commissioner v. Edwards*, 135 F. 2d 574, 576 (7th Cir. 1943). The petitioner says the policy should be included in the gross estate "at the present value of the face amounts of the policies but at not less than their cash surrender values."[2]

We have no direct authority in point. The petitioner has cited us some discussions by writers and a decision or two which we think too far away from the point at issue to be worth carrying into citation.

If the question were one with regard to an inter vivos gift of an insurance policy the law is well settled, by now, that the rule contended for by the Commissioner in this case is to be followed. *Guggenheim v. Rasquin*, 312 U.S. 254 (1941); *Powers v. Commissioner*, 312 U.S. 259 (1941); *United States v. Ryerson*, 312 U.S. 260 (1941); *Houston v. Commissioner*, 124 F.2d 518 (3d Cir. 1941); *Phipps v. Commissioner*, 43 BTA 790 (1941); *Lockhart v. Commissioner*, 46 BTA 426 (1942).

The taxpayer argues that we should not apply this rule to the case of an estate tax. It is contended that no one would make a gift of a life insurance policy unless the understanding with the donee was that he wanted the life insurance protection and would keep the policy. Where this information as to mental state of donors and donees comes from we do not know. Then the argument continues that the only value which an insurance policy on the life of another person has to the executor is its cash surrender value. The executor, it is argued, may not properly keep

2 If the terms of this claim seem ambiguous, the language is the petitioners, not ours. It is doubtless used in an effort to tie up the solution of the question with an earlier regulation hereafter discussed.

this insurance policy on the life of another in the estate because it does not produce enough income.

We do not go along with this argument by the petitioner. He cites us no authority that the executor must immediately cash in life insurance policies which the decedent owned on the life of another. Nor can we accept his argument that in all cases the value would not be anything more than the right to get the money at the cash surrender value. If the named insured were advanced in years and in precarious health, it might well be that the actual value, as a practical matter, is far more than the cash surrender value which the company by its charts and tables would be willing to pay on the policy on a given date.

But, as we remarked in *Mearkle's Estate v. Commissioner*, 129 F.2d 386, 388 (1942), these matters lie in the field of speculation or at best discussion. As pointed out by the Supreme Court in the *Guggenheim* case, *supra*, a life insurance policy is not a simple contract to pay money but a complex kind of a chose in action. The right to keep it to collect money at a future date may be worth more than the right to get today that part of the policy which, under the company's contract, is called its cash surrender value.

There is some advantage in having rules applicable to estate tax go along parallel with those applicable to gift tax since one is if not altogether complementary at least related to the other.[3] This does not mean that this parallelism must follow in every case. In a case where the rule is set in gift tax as it is in this situation, it is not unreasonable for the administrative arm of the government to adopt that rule for the similar problem in estate tax. This it has done by a 1952 amendment to the regulations which by its terms is to be given retroactive effect.[4]

The taxpayer argues that the amendment to the regulation changes the rule theretofore established also by regulation and cannot be applied retroactively to a situation

3 Harris v. Commissioner, 340 U.S. 106, 107 (1950).
4 T.D. 5906, 1952-1 Cum. Bull. 155, para. 1.

which arose before the current amendment was promulgated.

If the earlier regulation did in fact cover the type of problem presented by this case, the argument would require very thoughtful consideration. But we disagree with taxpayer's contention on the effect of the regulation. In our view the original regulation did not offer a solution to the problem here. Taxpayer cites a section which at first blush appears applicable because of general language about "future payments."[5] Yet the catch line heading this provision, "Annuities, life, remainder, and reversionary interests", indicates a much more limited scope, which we do not think properly expanded to cover an ordinary insurance policy on the life of another. And taxpayer himself puts in question the appropriateness of the regulation when he adds his own gloss to the method prescribed. "Present value" becomes "present value but not less than cash surrender value."

When under the Code of 1939 the regulation was drawn which governs the valuation of a gift of insurance on the life of another, the proper method had been made clear by court decisions and the established approach was reflected in the regulation.[6] At the time the regulation which taxpayer now cites was drafted there was no case law indicating the appropriate treatment for the comparable estate tax situation. With such a state of affairs we think it more reasonable to conclude that a regulation making no specific reference to insurance on the life of another was not designed to offer a definitive solution to a unique and complicated problem of valuation.

As we pointed out in a similar situation in the *Mearkle* case, cited above, here is a situation where it may well be that more than one method of valuation could be established as reasonable. A good case could be made, perhaps, for saying that what passed on from the dead to his executor

5 U.S. Treas. Reg. 105, § 81.10(*i*)(3) (1942).
6 U.S. Treas. Reg. 108, § 86.19(*i*) (1943).

was what the executor could get for this policy by turning it into money. As already said, however, that omits certain elements in the life insurance contract which may well change the rule when we decide upon its "value" at a particular time. When more than one rule is possible and the Commissioner has laid down one in complete accordance with the rule for gift taxation and which is not in itself unreasonable, we cannot say that the determination is so arbitrary as to be unlawful.

The decision of the Tax Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

No. 319

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IN THE

United States Court of Appeals

For the Third Circuit

No. 11800

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WILMINGTON TRUST COMPANY, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES

APPENDIX OF PETITIONER

CARBERY O'SHEA,
2 Wall Street,
New York 5, N. Y.
Attorney for Petitioner.

Of Counsel:

DONOVAN LEISURE NEWTON & IRVINE

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PETITIONER'S APPENDIX

Relevant Docket Entries

Tax Court Docket No. 17,261

		Record Document Number
1948		
Feb.	12—Petition received and filed. Taxpayer notified. Fee paid	2
March	9—Answer filed by General Counsel	5
1950		
May	11—Motion for leave to file attached amendment to petition granted, amendment filed	10
June	16—Answer to amendment to Petition filed by General Counsel. 6/19/50—Copy served	13
1951		
Oct.	1—Hearing had before Judge Van Fossan on the merits. Stipulation of facts filed. Petitioner's brief due 11/15/51; General Counsel's brief due 12/31/51. Petitioner's reply 1/15/52	24
"	8—Motion for leave to file amendment to petition granted, amendment filed	26
"	25—Transcript of Hearing 10/1/51 filed	27
Dec.	6—Answer to amendments to petition filed by General Counsel. 12/10/51—Copy served	30
"	20—Brief filed by taxpayer. (P) Copy served 12/31/51	32